TUAN HAJI ISHAK ISMAIL

v.

LEONG HUP HOLDINGS BHD. & 5 OTHER APPEALS

COURT OF APPEAL, KUALA LUMPUR
SITI NORMA YAAKOB JCA
MAHADEV SHANKAR JCA
ABDUL MALEK AHMAD JCA
[CIVIL APPEAL NO: W-02-218-95]
25 SEPTEMBER 1996

CIVIL PROCEDURE: *Costs - Getting-up and advocacy - Entitlement of solicitors - Appellants represented by separate set of solicitors - Whether entitled to same measure of fees - Whether a matter of Court's discretion - Whether Court could order gross sum in lieu of taxed costs - Order 55 Rules of the Court of Appeal 1995 - Order 59 r. 9(4) Rules of the High Court 1980.*

In the Court below, Leong Hup Holdings Bhd. ('Leong Hup') had filed a petition under s. 181 of the Companies Act 1965 against the appellants in these appeals. Leong Hup had also applied for and obtained an *ex parte* injunction restraining the appellants from holding an extraordinary general meeting of KFC Holdings (Malaysia) Bhd., the 10th respondent below. The appellants, who were represented by a separate set of solicitors, have joined forces and applied *vide* summons in chambers to strike out the petition under O. 18 r. 19(1) Rules of the High Court 1980. The applications, however, were dismissed by the learned Judge, whereupon appeals were filed by the solicitors. The appeals were confined to only one issue, namely whether the petition on its face disclosed any cause of action. The Court of Appeal allowed the appeals, but directed further argument on costs if no consensus was reached thereon.

It was not in dispute that both in the Court of Appeal and the Court below, substantial submission was only made by the first appellant's Counsel, with other Counsel playing only a supportive role, if at all. This apart, the first appellant's solicitors were also entirely responsible for the preparation of the record of appeal. Before the learned appeal Judges, following further argument by the parties as directed, questions *inter alia* arose as to whether the respective Counsel for the appellants herein were each entitled to the same measure of fees for getting-up and advocacy (and if so how much), or whether there should only be one getting-up fee to be shared by them all.

Held:

Per Mahadev Shankar JCA (delivering the judgment of the Court):

[1] Costs are always a matter of discretion and how the discretion is exercised depends on the facts of each case.

[2] It would be iniquitous for us to permit the same measure of fees for getting-up and advocacy to all Counsels in each of the six appeals. With the greatest of respect to all concerned, much of what was said after Encik Abraham, Counsel for the first appellant, completed his address, was only a repetition of the same legal principles with different cadences.

[3] Rule 55 of the Court of Appeal Rules makes the Rules of the High Court 1980 applicable for costs in the Court of Appeal. The provisions of O. 59 r. 9(4) of the Rules of the High Court 1980, thus, can be applied in this case.

[4] In the circumstances herein, the ends of justice will be best served by this Court exercising its discretion to award a gross sum under O. 59 Appendix 1, Part IV, Item 27 *in lieu* of taxed costs as follows. These costs shall be paid to the appellants by Leong Hup in addition to any other costs they shall be entitled to for **other** work done in this appeal which shall be taxed in the usual manner.

(i) Appeal 218-95 = RM100,000

(ii) Appeal 219-95 = RM40,000

(iii) Appeal 274-95 = RM25,000

(iv) Appeal 245-95 = RM10,000

(v) Appeal 248-95 = RM10,000

(vi) Appeal 251-95 = RM25,000

[5] It is also ordered that the costs in the Court below be taxed and paid up by Leong Hup to each of the respondents. They shall be entitled to present separate bills of costs for taxation but when it comes to O. 59, Appendix 1, Part IV, Item 26, the Registrar should have regard to what we have done here as a guide to how the getting-up fee and advocacy before the trial Judge should be inter-related.

[6] We do not think it right that we should make a gross award for the High Court costs without giving the parties a reasonable opportunity of clarifying the respective roles they played in the Court below where there were other

issues which were canvassed other than the single question as to whether the petition disclosed a cause of action. In any event, those costs should be higher than what we have awarded here because the efforts would have been more strenuous.

[Order accordingly.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR SIVIL: *Kos - Penyediaan dan kepeguaman - Hak peguamcara - Perayu diwakili oleh peguamcara yang berasingan - Samada berhak kepada jumlah fee yang sama - Samada merupakan perihal budibicara Mahkamah - Samada Mahkamah boleh memerintahkan jumlah kasar sebagai ganti bagi kos yang ditetapkan - Aturan 55 Kaedah-kaedah Mahkamah Rayuan 1995 - Aturan 59 k.9(4) Kaedah-kaedah Mahkamah Tinggi 1980.*

Dalam Mahkamah di bawah, Leong Hup Holdings Bhd. ('Leong Hup') telah memfailkan satu petisyen di bawah s. 181 Akta Syarikat 1965 terhadap perayu-perayu dalam rayuan-rayuan ini. Leong Hup telah juga memohon bagi mendapatkan dan telah mendapatkan satu injunksi *ex parte* yang menghalang perayu-perayu daripada mengadakan satu mesyuarat agung luar biasa KFC Holdings (Malaysia) Bhd., responden ke-10 di bawah. Perayu-perayu, yang diwakili oleh peguamcara-peguamcara yang berasingan, telah bergabung tenaga dan memohon melalui saman dalam kamar untuk membatalkan petisyen di bawah A. 18 k. 19(1) Kaedah-kaedah Mahkamah Tinggi 1980. Permohonan-permohonan tersebut, namun begitu, telah ditolak oleh Hakim yang bijaksana, lalu rayuan-rayuan telah difailkan oleh peguamcara-peguamcara tersebut. Sepertimana yang telah berlaku, rayuan-rayuan ini hanya tertumpu kepada satu isu sahaja, iaitu samada petisyen itu pada zahirnya mendedahkan apa-apa kausa tindakan. Mahkamah Rayuan telah membenarkan rayuan-rayuan tersebut, tetapi mengarahkan hujahan lanjut atas kos jika tiada perjanjian dicapai baginya.

Tidak dipertikaian bahawa dalam kedua-dua Mahkamah di bawah dan Mahkamah Rayuan, penghujahan yang substansial telah hanya dibuat oleh Peguam perayu pertama, dan Peguam yang lain cuma memainkan peranan menyokong sahaja, jika pun ada. Selain daripada ini, peguamcara perayu pertama adalah juga bertanggungan secara keseluruhannya bagi penyediaan rekod rayuan. Di hadapan Hakim-hakim rayuan yang bijaksana, berikutan dengan hujahan lanjut oleh pihak-pihak sepertimana yang diarahkan, persoalan, antara lainnya berbangkit samada Peguam bagi pihak perayu masing-masingnya berhak kepada kiraan fee yang sama bagi penyediaan dan kepeguaman (dan jika sedemikian berapa banyak), atau samada seharusnya hanya terdapat satu fee penyediaan untuk dikongsi oleh mereka semua.

Diputuskan:

Oleh Mahadev Shankar HMR (menyampaikan penghakiman Mahkamah):

[1] Kos adalah menjadi perkara budibicara dan bagaimana budibicara dilaksanakan mestilah bergantung kepada fakta setiap satu kes.

[2] Ianya adalah sangat tidak adil bagi kami membenarkan kiraan fee yang sama bagi penyediaan dan kepeguaman untuk kesemua Peguam dalam setiap satu dari enam rayuan itu. Dengan hormat kepada semua yang berkenaan, kebanyakan dari apa yang telah diperkatakan selepas Encik Abraham, Peguam bagi pihak perayu yang pertama, menggulung hujahnya, hanyalah ulangan prinsip undang-undang yang sama dengan nada yang berlainan.

[3] Kaedah 55 Kaedah-kaedah Mahkamah Rayuan menjadikan Kaedah-kaedah Mahkamah Tinggi 1980 terpakai bagi kos dalam Mahkamah Rayuan. Peruntukan A. 59 k. 9(4) Kaedah-kaedah Mahkamah Tinggi 1980, dengan itu, boleh dipakai dalam kes ini.

[4] Dalam keadaan yang wujud disini, penyudahan keadilan akan dilaksanakan dengan sebaiknya dengan Mahkamah ini melaksanakan budibicaranya untuk mengawardkan satu jumlah kasar di bawah A. 59, Apendiks 1, Bahagian IV, Perkara 27, bagi menggantikan kos yang ditetapkan seperti berikut. Kos-kos ini akan dibayar kepada perayu oleh Leong Hup sebagai tambahan kepada apa-apa kos yang lain yang mereka berhak bagi kerja-kerja lain yang telah dilakukan dalam rayuan ini yang mana akan ditetapkan menurut cara yang biasa.

(i) Rayuan 218-95 = RM100,000

(ii) Rayuan 219-95 = RM40,000

(iii) Rayuan 274-95 = RM25,000

(iv) Rayuan 245-95 = RM10,000

(v) Rayuan 248-95 = RM10,000

(vi) Rayuan 251-95 = RM25,000

[5] Adalah juga diperintahkan bahawa kos dalam Mahkamah di bawah ditetapkan dan dibayar oleh Leong Hup kepada setiap satu responden. Mereka akan berhak untuk mengemukakan bil-bil kos untuk penetapan yang berasingan tetapi apabila ianya berkaitan dengan A. 59 Apendiks 1, Bahagian IV, Perkara 26, Pendaftar seharusnya mengambil perhatian

kepada apa yang telah kami lakukan di sini sebagai satu garisan panduan bagaimana fee penyediaan dan kepeguaman di hadapan Hakim perbicaraan seharusnya dikaitkan.

[6] Kami berfikiran bahawa ianya tidak wajar untuk kami membuat satu award kasar bagi kos Mahkamah Tinggi tanpa memberikan pihak-pihak yang berkenaan peluang yang sewajarnya untuk menjelaskan peranan mereka masing-masingnya yang dimainkan dalam Mahkamah di bawah di mana terdapat isu-isu lain yang telah diusahakan selain daripada persoalan tunggal mengenai samada petisyen itu mendedahkan satu kausa tindakan. Dalam apa keadaan pun, kos-kos itu seharusnya lebih tinggi daripada apa yang telah kami awardkan di sini kerana usaha-usahanya adalah lebih gigih dan memenatkan.

Cases referred to:
Ritter v. Godfrey [1920] KB 47 ***(cit)***
Donald Campbell and Company Ltd. v. Pollak [1927] AC 732 ***(cit)***
Lim Heng Hoo v. Tan Hock Hai & Ors. [1976] 2 MLJ 159 ***(cit)***

Legislation referred to:
Companies Act 1965, s. 181
Rules of the Court of Appeal 1994, rr. 55, 96
Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (c), O. 59 r. 9(4)

Other sources referred to:
Supreme Court Practice 1995, Vol. 1, para. 63/3/2

For the 1st appellant - R.S. Nathan; M/s. Jeyaratnam & Chong
For the 2nd, 3rd & 5th appellants - Y.M. Siew; M/s Raja Eleena, Siew Ang & Tan
For the 4th appellant - Augustine Poh; M/s. Cheong Kee Fong & Co.

JUDGMENT

Mahadev Shankar JCA:

This matter concerns a petition under s. 181 of the Companies Act 1965, claiming that the affairs of the tenth respondent was being conducted in a manner oppressive to the petitioner. The trial Judge dismissed applications by the respondents to the petition to have the petition struck out under O. 18 r. 19(1) of the Rules of the High Court 1980, and directed that there be a full trial. We allowed the appeal but directed that there be further argument on the question of costs if the parties were unable to reach agreement thereon.

Since the parties have not been able to agree, we have had to hear further arguments. Basically each of the appellants wants to be paid a separate set of costs. Counsel for each of the appellants indicated to the Court that each regards himself entitled to a getting-up fee of at least RM100,000.

Respondent's Counsel in this appeal submits that there should only be one getting-up fee to be shared by the appellants in such manner as the Court may direct.

Leong Hup Holdings Bhd. ('Leong Hup') filed a single petition against all 10 respondents on 13 February 1995. The next day, Leong Hup filed an *ex parte* summons in chambers to obtain an injunction against all the respondents from holding an extraordinary general meeting which it obtained on 15 February 1995. On 21 February 1995, the first respondent filed a summons to strike out the petition under O. 18 r. 19 of the Rules of the High Court. On 27 February 1995, Leong Hup filed an *inter partes* summons in chambers to obtain an injunction and related orders. The other respondents joined forces with the first and also filed summons in chambers to strike out the petition under O. 18 r. 19. They were grouped as follows:

(1) The second, third and fifth filed on 27 February.

(2) The sixth filed on 28 February.

(3) The seventh on 28 February.

(4) The eighth and ninth on 28 February.

(5) The fourth on 24 February.

Each group was represented by a separate set of solicitors but a perusal of the summons in chambers indicates that all of them were urging the same legal grounds for the relief sought. They wanted the *ex parte* injunction set aside and they wanted the petition struck out.

All the summons in chambers were heard together over a number of days. It has to be emphasised here that voluminous affidavits were filed in the Court below in support of all the grounds under O. 18 r. 19(1)(a), (b) and (c) in the application to set aside the injunction. The judgment of the trial Judge shows that he was appraised of all this material when the arguments got under way. But in midstream as it were, the respondents in the Court below stated that they would rest their case solely on the ground that the petition on the face of it did not disclose a reasonable cause of action, i.e. O. 18 r. 19(1)(a) alone. (See Appeal Record ('A.R.') p. 195).

It is clear from the notes of evidence (A.R. 195-243) that the substantial submissions were made for the respondents in the Court below by Counsel for the first respondent. There was also some significant support from Counsel for the second, third and fifth respondents, and somewhat less by Counsel for the fourth respondent and the ninth respondent. The rest merely supported these submissions.

After the Judge dismissed the application to strike out, all the respondents below appealed. The grouping and their respective Counsel were as follows:

(1) 218-95 : First respondent represented by Encik Cecil Abraham and Encik R.S. Nathan.

(2) 219-95 : Second, third, and fifth respondents represented by Encik Y.M. Siew.

(3) 274-95 : Fourth respondent represented by Encik Augustine Poh.

(4) 245-95 : Sixth respondent represented by Encik Teh Boon Eng, Encik N. Navaratnam and Encik P. Gananathan.

(5) 248-95 : Seventh respondent represented by Encik Jaswinder Singh.

(6) 251-95 : Eighth and ninth respondents represented by Encik Ghazi Ishak.

The appeals were confined to one issue only:

Did the petition on its face disclose a cause of action?

Once again the substantial submission was made by Encik Abraham. Encik Y.M. Siew and Encik Augustine Poh adopted his submission and elaborated upon it. Encik Ghazi Ishak was of some assistance to us as to the non-involvement of the eighth and ninth respondents in the dispute. Encik Teh and Encik Jaswinder Singh merely adopted the submissions of the other three and did not address us at all.

It should be immediately apparent that it would be iniquitous for us to permit the same measure of fees for getting-up and advocacy to all Counsel in each of the six appeals. With the greatest respect to all concerned, much of what was said after Encik Abraham completed his address was only a repetition of the same legal principles with different cadences.

Our attention was directed to the passage at the *Supreme Court Practice 1995* Vol. 1 para. 63/3/2 which is the equivalent of our O. 59 r. 3, and the relevant statements in *Ritter v. Godfrey* [1920] KB 47, *Donald Campbell and Company Ltd. v. Pollak* [1927] AC 732 at p. 821 and *Lim Heng Hoo v. Tan Hock Hai & Ors.* [1976] 2 MLJ 159.

We must confess we did not find these cases particularly helpful. Costs are always a matter of discretion (see r. 96 of the Court of Appeal Rules 1994), and how a discretion is exercised must be governed by the facts of each case.

Rule 55 of the Court of Appeal Rules makes the Rules of the High Court 1980 applicable for costs in the Court of Appeal. Order 59 r. 9(4) of the Rules of the High Court 1980 reads:

(4) The Court in awarding costs to any person may direct that, instead of taxed costs, that person shall be entitled:

(a) to a proportion specified in the direction of the taxed costs or to the taxed costs from or up to a stage of the proceedings so specified; or

(b) to a gross sum so specified *in lieu* of taxed costs.

Encik R.S. Nathan has pointed out that the preparation of the appeal record was entirely the work of the first respondent's solicitors. The rest of the work done in an appeal falls almost entirely under O. 59, Appendix 1, Part IV, Item 27. Almost all the cases cited to us were already cited in the Court below.

In these circumstances and only so far as this appeal is concerned we think that the ends of justice will be best served by our exercising our discretion to award a gross sum under O. 59 Appendix 1, Part IV, Item 27, *in lieu* of taxed costs for this item as follows:

(1) Appeal 218-95 = RM100,000

(2) Appeal 219-95 = RM40,000

(3) Appeal 274-95 = RM25,000

(4) Appeal 245-95 = RM10,000

(5) Appeal 248-95 = RM10,000

(6) Appeal 251-95 = RM25,000

These costs shall be paid to the appellants by Leong Hup in addition to any other costs they shall be entitled to for **other** work done in this appeal which shall be taxed in the usual manner.

We also order that all the costs in the Court below shall be taxed and paid by Leong Hup to each of the respondents. They shall be entitled to present separate bills of costs for taxation but when it comes to O. 59 Appendix 1, Part IV, Item 26, the Registrar should have regard to what we have done here as a guide to how the getting-up fee and advocacy before the trial Judge should be inter-related. We do not think it right that we should make a gross award for the High Court costs without giving the parties a reasonable opportunity of clarifying the respective roles they played in the Court below where there were other issues which were canvassed other than the single question as to whether the petition disclosed a cause of action. In any event, those costs **should be higher** than what we have awarded here because the efforts would have been more strenuous.

Reported by W.A. Sharif